

Non-State Actors and the Use of Force

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1. Introduction

There can be no doubt that non-state actors (NSAs) have attained an increasingly prominent role in almost all frameworks of a fragmented international legal system. In this respect the framework governing the use of force is no exception. However, while the law on the use of force *against* NSAs has, as this chapter will demonstrate, gone through a process of development over the past 20 years, the law governing the use of force *by* NSAs has not witnessed a similar development. In particular, while the norm prohibiting the threat or use of force and the contemporary right of self-defence have a birth date of 1945,¹ their subjects have remained state actors. Although arguments can be made that the rules and norms of the *jus ad bellum* apply to certain NSAs, perhaps in the context of what we might call ‘contested states’,² it is difficult to find any authority or support for claims that the activities of other NSAs, such as terrorist groups, are now also regulated by them.³ As we witness frequently, regulation of the forcible activities of these NSAs is still through the criminal law, of both a domestic and international nature.⁴

This chapter will thus primarily focus upon the law as it applies to the use of force by states against NSAs, in particular those perceived by the acting states as being of a terrorist nature. In the context of what we might call ‘global’ terrorism these actors and their bases are rarely found upon the territory of the state against which they target their terrorist activities. In these circumstances it is the response of the victim state which international law has most to say and requires an examination of issues such as the gravity of the attacks which have been undertaken by the NSA, the location of the NSAs at the time any response is undertaken, the delay in the response, the responsibility of the host state and whether the acts of the NSAs can be attributed to it, and the aim and modalities of the resulting forcible actions undertaken by the victim state. However, before examining, and hopefully clarifying, these issues, this

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¹ See Articles 2(4) and 51 of the UN Charter (1945) respectively.

² See C. Henderson, ‘Contested States and the Rights and Obligations of the *Jus ad Bellum*, (2013) 21 *Cardozo Journal of International and Comparative Law* 367.

³ See N. Tsagourias, ‘Non-State Actors and the Use of Force’, in J. d’Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Abingdon: Routledge, 2011) 326.

⁴ For example, as recently as the end of 2013, the alleged al-Qaida leader Nazih Abdul-Hamed al-Ruqai, more commonly known by his alias Abu Anas al-Liby, who was wanted by the US for the 1998 bombings of the US embassies in Kenya and Tanzania, appeared before a Federal Court in New York to plead not guilty to the offences with which he was charged, none of which involved a violation of the rule prohibiting the threat or use of force. See BBC News, ‘Al-Qaida suspect al-Liby in New York to face charges’, 15 October 2013, available at <http://www.bbc.co.uk/news/world-africa-24528600>.

chapter will first provide brief treatment of the use of force by and against NSAs in the domestic context.

2. Non-state actors and the regulation of the internal use of force

Traditionally, and as an integral element of state sovereignty, matters that occurred within a state were the sole concern of that state. The police or armed forces of a state were in this respect relatively unrestricted in their use of force within the territorial confines of that state. Today, while there is no discrete and independent norm prohibiting a state from using force against individuals located within its territory, international human rights law provides some regulation of the actions of state authorities in peacetime situations. Law enforcement officers, for example, are not able to use force freely, and in particular are not permitted to simply deprive an individual of their life. Indeed, everyone has the right not to be ‘arbitrarily deprived of [their] life’, as expressly contained within a landmark Convention adopted in the 1960s.⁵ So while the death penalty is not entirely precluded under international human rights law, in the extra-judicial context individuals cannot simply be targeted with lethal force, regardless of the gravity of the crime that they have allegedly committed. Instead, they should be given the right to surrender and/or be arrested. However, this formulation of the right to life suggests that it is not absolute. If an individual poses an imminent threat to the life or safety of others, for example, lethal force may be used against that individual.⁶ Furthermore, as has been witnessed most prominently in the Arab Spring, internal disturbances that are regulated by international human rights law may reach the intensity of a non-international armed conflict between rebel forces and the armed forces of a state. At this point international humanitarian law provides an additional form of regulation, and a basis upon which to judge the actions of both the state and NSAs involved.⁷

A perennial issue that has most recently made an appearance in the context of the Arab Spring is whether given the disparity in arms between NSAs within a state and the state armed forces outside states may assist the NSAs in their struggle against the state authorities. Any assistance during peacetime constitutes an infringement of the principle of non-intervention, one that, although not well-defined,⁸ is nonetheless now well-established in customary international law.⁹ While passing comment upon the affairs of another state is not caught by the principle, interventions that take on a coercive nature are,¹⁰ with the most obvious form of coercion being a use of force which, as the International Court of Justice (ICJ) has attempted to clarify, may take the form of the provision of arms or training or other

⁵ See Article 6(1), International Covenant on Civil and Political Rights (1966)

⁶ See N. Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), at 101.

⁷ See, in general, S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012); L. Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002).

⁸ In general this principle can be said to ‘involve[] the right of every sovereign state to conduct its affairs without outside interference’. See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits)* (1988) ICJ Rep. 14, at para.202.

⁹ *Nicaragua Case*, *ibid.*, at para. 246; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, GA Resolution 2131 (XX), UN Doc. A/RES/20/2131 (21 December 1965), at para. 1; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Resolution 2625 (XXV), UN Doc. A/Res/25/2625 (24 October 1970), at para. 3; Article 19, Charter of the Organization of American States (1948); M. Shaw, *International Law*, 6th edn (Cambridge: Cambridge University Press, 2008), at 1147.

¹⁰ *Nicaragua Case*, *ibid.*, at para. 205.

forms of military assistance.¹¹ Although some have claimed that during a civil war, where the outcome is not certain, assistance to both the NSAs *and* the government of the state concerned becomes prohibited,¹² state practice during the Arab Spring confirms that this is not the case. Indeed, the sale of weapons by Russia to Syria, while condemned by many, was not considered unlawful.¹³ Although the NSAs in the Arab Spring might be considered to be struggling to secure their right to self-determination,¹⁴ the elaboration of this right, and the ambiguity as to whether it provided for a right of states to assist through forcible means those fighting for it, emanates from the decolonisation era of the twentieth century. It does, in this respect, appear to be limited to national liberation movements battling against colonialism and occupation, as opposed to disgruntled groups seeking to overthrow a government or achieve secession.

However, in the Arab Spring, along with various incidences in the 1990s, the use of force by the state authorities concerned was criticised by other states as excessive.¹⁵ This concern does pose the question of whether a customary prohibition upon the use of *internal* force by States might be emerging.¹⁶ Yet, while one cannot rule out the possibility of such a norm emerging in the future, it is premature to state that one exists *lex lata*. Indeed, examining the condemnation from the international community of the repressive use of force by the Libyan and Syrian authorities against parts of their own populations suggests that this was framed in the context of international human rights law and international criminal law,¹⁷ as opposed to a discrete norm governing the internal use of force.

3. The regulation of the international use of force against non-state actors

An issue that has given rise to particular difficulties in state practice, the jurisprudence of the ICJ, and in scholarship, is the use of force against NSAs that are located outside of the territory of the victim state. Any forcible action outside of the territory of the state is independently prohibited in Article 2(4) of the UN Charter, a prohibition also established as a norm under customary international law¹⁸:

¹¹ Ibid. The Court stated that while arming and training rebels was an unlawful use of force the supply of funds was instead an unlawful intervention. Ibid., at para.228.

¹² See L. Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', (1985) 56 *British Yearbook of International Law* 189, at 251; C. Gray, *International Law and the Use of Force*, 3rd edn (Oxford: Oxford University Press, 2008), at 92.

¹³ C. Henderson, 'The Provision of Arms and "Non-Lethal" Assistance to Government and Opposition Forces', (2013) 36 *University of New South Wales Law Journal* 642, at 669-670

¹⁴ As the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States declared: 'all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development'. See *supra* n.8, at para. 5

¹⁵ On the Syria conflict, see UN Doc. A/RES/66/253/B, 7 August 2012, preamble, which expressed '[c]oncern[] about ... the use by the Syrian authorities of *excessive* force (...)' (emphasis added). On the Kosovo conflict, see UN Doc S/RES/1160 (1998), 31 March 1998, preamble, which '[c]ondemn[ed] the use of *excessive* force by Serbian police forces against civilians and peaceful demonstrators in Kosovo (...)' (emphasis added).

¹⁶ See, for example, J.A. Frowein, 'Globale und regionale Friedenssicherung nach 50 Jahren Vereinte Nationen', (1995) 114 *Zeitschrift für Schweizerisches Recht* 257, at 269-270.

¹⁷ See, on Libya, UN Doc S/RES/1970 (26 February 2011), preamble; UN Doc S/RES/1973 (17 March 2011), preamble; on Syria, see, for example, UN Doc S/RES/2042 (14 April 2012), preamble; UN Doc S/RES/2043 (21 April 2012), preamble; UN Doc A/67/L63 (8 May 2013), preamble. See, in general, A. Bellal and L. Doswald-Beck, 'Evaluating the Use of Force During the Arab Spring', (2011) 14 *Yearbook of International Humanitarian Law* 3.

¹⁸ *Nicaragua* case, *supra* n.8.

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

One might argue, of course, that a limited use of force to attack NSAs located upon the territory of a third state would not constitute a violation of the host state's 'territorial integrity or political independence' as it would not be depriving the state of its territory or the independence of its government.¹⁹ Yet, the inclusion of such an – admittedly unnecessary and clumsy – stipulation in Article 2(4) is, nonetheless, a result of the drafters wishing to emphasize the protection of these two attributes of statehood, as opposed to intending to provide an additional exception or loophole in the breadth and scope of the prohibition.²⁰ In this sense, Article 2(4) also does not provide, or allude to, the existence of any exceptions to the prohibition. However, as included elsewhere in the Charter and now well established in customary international law,²¹ there are two well-known exceptions to this prohibition, both of which have relevance to the context of forcible measures against NSAs.

3.1. Action taken or authorised by the UN Security Council

The threat or use of force may be authorised by the United Nations Security Council (UNSC), an organ which has a central role in the regime governing the use of force.²² In order for the forcible powers of the UNSC to become available, the Council first needs to identify the existence of either a threat to the peace, breach of the peace or act of aggression.²³ While the identification of the latter two by the Council is relatively rare, it now regularly identifies threats to the peace, as a precursor to measures being taken of both a non-forcible and forcible nature.²⁴ The UNSC has a wide discretion in determining a threat to the peace,²⁵ which does not have to be specifically connected with the activities of a state.²⁶ There is, as such, no hurdle to the activities of a non-state actor constituting a threat.²⁷ Indeed, the resolutions adopted by the UNSC in the aftermath of the events of 9/11 identified the

¹⁹ See, for example, D. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958), at 152.

²⁰ See A. Randelzhofer, 'Article 2(4)', in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edn (Oxford: Oxford University Press, 2002), 112, at paras 37-9.

²¹ *Nicaragua case*, *supra* n.8, at para.34.

²² See, in general, C. Henderson, 'The Centrality of the United Nations Security Council in the Legal Regime Governing the Use of Force', in N.D. White and C. Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (Cheltenham: Edward Elgar Publishing, 2013), 120.

²³ Article 39, UN Charter (1945).

²⁴ See Articles 41 and 42 respectively of the UN Charter (1945).

²⁵ H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London: Stevens, 1950), at 727.

²⁶ See M. Wood, 'The role of the UN Security Council in relation to the use of force against terrorists', in L. van den Herik and N. Schrijver, *Counter-Terrorism Strategies in a Fragmented International Order: Meeting the Challenges* (Cambridge: Cambridge University Press, 2013), 317, at 322.

²⁷ See, for example, UNSC Resolution 1438 (2002) (Bali); UNSC Resolution 1530 (2004) (Madrid); UNSC Resolution 1377 (2001) ('Declaration on the Global Effort to Combat Terrorism'); UNSC Resolution 1456 (2003) ('Declaration on the Issue of Combating Terrorism'). As Gazzini notes, 'in a string of resolutions ...the Security Council without hesitation declared international terrorism a threat to peace'. See T. Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester: Manchester University Press, 2005), at 33.

existence of a threat to the peace, without simultaneously identifying a state as the perpetrator of the attacks.²⁸

With the identification of a threat to the peace, the UNSC is, without having to exhaust non-forcible options first,²⁹ able to authorise the use of force by states or regional organisations.³⁰ In this respect it could well be argued that the forcible response to the attacks of 9/11 should have been authorised by the UNSC, given its prior determination of a threat to the peace and the delay between the attacks and the response,³¹ rather than taken as a unilateral act of self-defence.³² There can be no doubt that it would have done so in light of the widespread condemnation of the attacks and the general support for a forcible response.³³ Furthermore, the UNSC force can conceivably authorise force not just in response to a prior use of force by NSAs, but simply because the peace was threatened by their actions or intentions. In this sense authorisation by the UNSC in response to a threat to the peace has a pre-emptive thrust. However, while the UNSC has been particularly active in taking measures of a non-forcible nature in regards to the activities of NSAs,³⁴ the UNSC has only occasionally authorised states to use force in a state in response to attacks by NSAs, and even then with the consent of the host state.³⁵ The UNSC is yet to authorise forcible intervention in another state in response to the activities of a NSA located there and against the wishes of the host state.

3.2. Unilateral action by states and regional organisations

Despite the possibility today of UNSC authorization states tend to prefer to take matters into their own hands in responding forcibly to terrorism. In this respect, state action is restricted to those taken in self-defence. The right of self-defence, as contained in Article 51 of the UN Charter,³⁶ provides that:

²⁸ UNSC Resolutions 1368 (2001) and 1373 (2001).

²⁹ Article 42 of the UN Charter (1945) merely states that the Council should ‘consider that measures provided for in Article 41 *would be* inadequate or have proved to be inadequate...’ (emphasis added).

³⁰ Tams notes that ‘unlike 20 years ago, it is beyond doubt today that the Security Council can authorize military measures against terrorists, and thereby justify the extraterritorial use of force by a state implementing that mandate.’ C. Tams, ‘The Use of Force against Terrorists’, (2009) 20 *European Journal of International Law* 359, at 377.

³¹ The delay may provide the action with the look of being taken in retaliation or punishment, rather than defense, and thus constituting an unlawful reprisal. However, as Tams has observed, recent state practice ‘seems to suggest that as long as victim states claimed to act defensively, other states are likely to accept their explanation even if the real motive might have been to retaliate or punish.’ C.J. Tams, ‘The necessity and proportionality of anti-terrorist self-defence’, in van den Herik and Schrijver, *supra* n. 26, 373, at 401.

³² For more on which see *infra* section 3.2.

³³ *Ibid.*

³⁴ It has, for example, established an anti-terrorism committee and ordered UN member states to freeze the bank accounts of certain individuals suspected of being terrorists. See, respectively, UNSC Resolutions 1267 (1999), 1373 (2001), and 1735 (2006).

³⁵ See, for example, UNSC Resolution 2085 (2012), paras 7, 9, 11, 13 and 14 in which the UNSC authorized the use of force (‘all necessary measures’) by an African-led International Support Mission in Mali (AFISMA) while urging all member States, including ‘interested bilateral partners’ to help the deployment of AFISMA and offer ‘any necessary assistance in efforts to reduce the threat posed by terrorist organizations...’. There was, however, consent to this authorization by the Malian authorities. Furthermore, in UNSC Resolution 1851 (2008) the UNSC authorised States and regional organisations ‘to undertake all necessary measures that are appropriate in Somalia, for the purposes of suppressing acts of piracy and armed robbery at sea’.

³⁶ This is also a right of customary international law. See *Nicaragua* case, *supra* n.8, at para.176. While the right as found in Article 51 has undoubtedly influenced and informed the customary form of the right, the customary right of self-defence has had an equal impact upon how we read and interpret the treaty form of the right, in

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

While the prohibition of the use of force is firmly placed within the inter-state conception of international law in prohibiting the threat or use of force in their ‘international relations’ and against ‘any state’,³⁷ Article 51 merely affirms an inherent right of self-defence ‘if an armed attack occurs’, without specifying that it must be perpetrated by a state.³⁸ Thus, while the ICJ has stated as recently as 2005 in its *Wall* advisory opinion, in a statement ‘startling in its brevity’,³⁹ that ‘Article 51 of the Charter ...recognizes the existence of an inherent right of self-defence in the case of armed attack *by one State* against another State’,⁴⁰ Judge Higgins was correct in pointing out in her separate opinion that ‘[t]here is, with respect, nothing in the text of Article 51 that...stipulates that self-defence is available only when an armed attack is made by a State.’⁴¹

Furthermore, state practice since 9/11 would now seem to suggest that – if indeed it ever was the case that the law required state involvement in an ‘armed attack’ before self-defence could be invoked – international law has now developed to allow for self-defence against ‘armed attacks’ perpetrated by NSAs.⁴² For example, the fact is that al-Qaida was not a wing of the Afghan state when it carried out the 9/11 attacks and yet the justification of self-defence under Article 51 by the US for the launching of *Operation Enduring Freedom* in

particular by requiring that any action in self-defence, whether against a state or non-state actor, must be both necessary and proportionate. For more see *infra* n.60 and section 3.2.2.

³⁷ See *supra* section 3.

³⁸ See N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2010), at 31-32; E. Wilmschurst, ‘The Chatham House Principles of International Law on the Use of Force in Self-Defence’, (2006) 55 *International and Comparative Law Quarterly* 963, at 969-970 (hereinafter ‘Chatham House principles’)..

³⁹ S.D. Murphy, ‘Self-defence and the Israeli Wall Opinion – An *Ipse Dixit* from the Court?’, (2005) 99 *American Journal of International Law* 62, at 62.

⁴⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion, (2004) ICJ Reports 135, para. 139 (emphasis added).

⁴¹ *Ibid.*, separate opinion of Judge Higgins, para. 33. See also *ibid.*, separate opinion of Judge Kooijmans, para. 35, and declaration of Judge Buergenthal, para. 6; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, merits, (2005) ICJ Reports 169, separate opinion of Judge Simma, paras. 4-15, declaration of Judge Koroma, para. 9, and separate opinion of Judge Kooijmans, paras 19-30.

⁴² There is much academic support for this view. See, for example, T.M. Franck, ‘Terrorism and the Right of Self-Defence’ (2001) 95 *American Journal of International Law* 839, 840; Murphy, *supra* n.35, at 67-70; K.N. Trapp, ‘Back to Basics: Necessity, Proportionality and the Right of Self-Defence Against Non-State Terrorist Actors’ (2007) 56 *International and Comparative Law Quarterly* 141, particularly 147-155; R. Wedgwood, ‘Responding to Terrorism: Strikes Against bin Laden’ (1999) 24 *Yale Journal of International Law* 559, particularly at 564; and R. Wedgwood, ‘The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defence’ (2005) 99 *American Journal of International Law* 52, 57-59; Chatham House principles, *supra* n.38, at 970. For more on this point see *infra* sections 3.2.1 and 3.2.2.

2001 was overwhelmingly accepted, or at least acquiesced in.⁴³ Similarly, when Israel launched its operations against Hezbollah in Lebanon in 2006 the justification of self-defence in response to these attacks by this particular group was, in principle, accepted.⁴⁴

Yet while nothing exists conceptually to prevent NSAs from carrying out an ‘armed attack’, the issue arises as to what constitutes such an attack. Although both were implicitly accepted as armed attacks giving rise to the right of self-defence the attacks by the NSAs in these two examples were of a starkly differing nature with the former using aircrafts as missiles with the resulting deaths of 3,000 civilians, while the latter resulted in the death of three military personnel from the use of an anti-tank missile and the abduction of a further two soldiers. The ICJ has adopted the position that armed attacks (that give rise to the right of self-defence), are distinguished from mere uses of force, (which do not), by their ‘gravity’ and ‘scale and effects’.⁴⁵ The 9/11 attacks can be clearly separated in their ‘scale and effects’ from the incident in Israel that sparked the war in Lebanon. The Court did not, however, elaborate further on how one is to make this distinction,⁴⁶ which has led some, such as Rosalyn Higgins, to argue that it is in practice operationally unworkable and that instead the legality of a forcible response will depend more upon the proportionality of the response as opposed to the gravity of the prior attack.⁴⁷ The above two examples arguably bear witness to this, as whereas the 9/11 attacks where so many lives were lost led to the forcible toppling of a governmental regime, the relatively minor attacks by Hezbollah led to more limited strikes within Lebanon. While the latter operation was accepted by the international community as a lawful action in self-defence, when Israel began targeting Lebanese state infrastructure condemnation of them as disproportionate became widespread.⁴⁸

If one accepts, however, that a certain gravity is necessary before a use of force constitutes an ‘armed attack’ for the purposes of Article 51 of Charter,⁴⁹ then terrorist attacks may pose a particular problem, in that that the *modus operandi* of terrorist groups is not, generally speaking, to launch attacks on the scale of that witnessed on 9/11, which on their own were

⁴³ Although the support of the international community for the US’s forcible response to the horrendous 9/11 attacks may be explained in various ways, and should not be taken in and of itself as representing a shift in international law, *Operation Enduring Freedom* was nonetheless explicitly condoned in 2001 by Russia, China, Pakistan, Japan, the United Arab Emirates and Saudi Arabia, as well as by nineteen NATO States. Offers of direct military assistance to the United States came from the United Kingdom, Australia, Canada, Singapore, Spain, Turkey, Ukraine, Romania, Portugal, New Zealand, the Netherlands, Germany, Italy, Jordan, Belgium, Denmark, France and South Korea (collated by the United States Department of State, <http://www.state.gov/s/ct/rls/fs/2001/5194.htm> and the United Kingdom Parliament, <http://www.parliament.uk/commons/lib/research/rp2001/rp01-081.pdf>, 31). See also SC Res. 1368; SC Res. 1373; S.D. Murphy (ed.), ‘Contemporary Practice of the United States Relating to International Law’ (2002) 96 *American Journal of International Law* 237, especially 248; and M.J. Kelly, ‘Understanding September 11th – An International Legal Perspective on the War in Afghanistan’ (2001-2002) 35 *Creighton Law Review* 283, 285-286.

⁴⁴ See UN Doc. S/PV.5489 (2006).

⁴⁵ *Nicaragua case*, *supra* n. 8 at para.191; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, merits, (2003) ICJ Reports 161, at paras 51 and 62; *Armed Activities case*, *supra* n. 38, at para.147.

⁴⁶ A distinction that appears to be no different depending upon whether the attack is perpetrated by state or non-state actors. See S.R. Ratner, ‘Self-defence against terrorists: the meaning of armed attack’, in van den Herik and Schrijver, *supra* n. 26, 334, at 341. Cf Chatham House principles, *supra* n. 38, at 971.

⁴⁷ R. Higgins, *Problems and Prospects: International Law and How We Use It* (Oxford: Clarendon, 1994), at 251. See *infra* n.61.

⁴⁸ See UN Doc. S/PV.5488.

⁴⁹ See, for example, Gray, *supra* n.12, at 148.

accepted as having the gravity of an armed attack.⁵⁰ Instead, terrorist groups, due often to their size, capabilities and covert nature, launch smaller ‘pin prick’ attacks on a regular basis.⁵¹ This sort of activity can arguably be witnessed in the missiles that are regularly launched by Hamas affiliated NSAs from the Gaza Strip into Israel. In response to these types of pin prick attacks, some maintain that, under what is called the ‘accumulation of events’ theory, a state is permitted to equate the accumulation of these smaller attacks to an ‘armed attack’, thus justifying a forcible response in self-defence. Although controversial from many perspectives, Israel’s invasion into the Gaza Strip in 2008/09 is an example of this theory in action.⁵² Yet, there has been little discernable acceptance of this theory by states, and while the ICJ has, perhaps unwittingly, given a certain nod to it,⁵³ the UNSC has seemingly rejected it.⁵⁴ It, as such, remains an element of the law that is unclear.⁵⁵

Discussion of the accumulation of events theory also raises the issue of the temporal nature of an armed attack for the purposes of Article 51, which permits self-defence ‘if an armed attack occurs’. While it is conceivable to think of a state responding in self-defence to an ‘armed attack’ of an NSA that is actually in progress, the covert nature of terrorist groups and the surprise element of their attacks, combined with the need to obtain sufficient evidence to identify the perpetrator following one⁵⁶ and the various preliminary issues that need to be addressed,⁵⁷ dictates that the response is most often likely to occur after the particular attack has come to an end, sometimes by a considerable amount of time. For these reasons, the response to the 9/11 attacks, for example, came several weeks after the attacks.⁵⁸ While it may be claimed that actions taken ostensibly in self-defence are more akin to actions of reprisal,⁵⁹ as long as the response can be seen to have a clear and identifiable defensive element to it such a distinction has now become blurred to the point of extinction.

Although a response in self-defence may resemble a reprisal action, given the delay between the initial attack and the response, the defensive element to the forcible response is

⁵⁰ See S.D. Murphy, ‘Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter’, (2002) 43 *Harvard International Law Journal* 41, especially 45-51; and C. Antonopoulos, ‘Force by Armed Groups as Armed Attack and the Broadening of Self-Defence’, (2008) 55 *Netherlands International Law Review* 159, at 169. By recognising the right of self-defence in the aftermath of 11 September 2001, the Security Council appeared to imply that this attack could be viewed as an armed attack in UNSC Resolution 1368 (2001). However, the issue of gravity was not referenced explicitly in the resolution.

⁵¹ C. Greenwood, ‘International Law and the United States’ Air Operation against Libya’, (1987) 89 *West Virginia Law Review* 933, at 955-6.

⁵² UN Doc. S/2006/515.

⁵³ See, for example, *Oil Platforms* case, *supra* n.42, at para.64.

⁵⁴ Gray, *supra* n.12, at 155.

⁵⁵ It has been accepted by some authors. See, for example, T. Reinold, ‘State Weakness, Irregular Warfare and the Right of Self-Defense post-9/11’, (2011) 105 *American Journal of International Law* 244, at 271, 284, and 284. However, it has been rejected by many others on the basis that it possibly provides ‘an open-ended licence to use force’. See E.S. Wilmhurst, ‘Anticipatory self-defence against terrorists’, in van den Herik and Schriver, *supra* n. 26, 356, at 368; N.D. White, *Advanced Introduction to International Conflict and Security Law* (Cheltenham: Edward Elgar, 2014), at 43.

⁵⁶ See M.E. O’Connell, ‘Evidence of Terror’, (2002) 7 *Journal of Conflict and Security Law* 19.

⁵⁷ Gauging whether the state is willing and able to take action against the terrorist group, for example. See A.S. Deeks, ‘“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense’, (2012) 52 *Virginia Journal of International Law* 483. See *infra* section 3.2.2.

⁵⁸ After gathering evidence attributing the attacks to al-Qaida the US unsuccessfully requested the Taliban to unconditionally close al-Qaida training camps in Afghanistan, surrender Osama bin Laden to the US, and open Afghanistan to inspections. See *Keesing’s Record of World Events* (2001) 44337.

⁵⁹ For this reason Dinstein employs the term ‘defensive armed reprisals’ to distinguish between purely punitive actions and those of a defensive nature. Y. Dinstein, *War, Aggression and Self-Defence*, 5th edn (Cambridge: Cambridge University Press, 2011), at 244-245.

nonetheless often portrayed prospectively. Given the overarching aims of terrorist groups and the likelihood that following one attack plans are afoot for another, the action will often be taken with the expressed aim of preventing further future attacks. While if no prior attack from the particular terrorist group had been sustained the response would be difficult to reconcile with Article 51's requirement for the 'occurrence' of an armed attack, and in this sense appear to be purely of an anticipatory or preemptive nature,⁶⁰ such a prospective thrust to the defensive claims of states does not seem to be a bar to acceptance of the legality of the action if the victim state has previously been the victim of an attack from the targeted group. For example, in its justification for *Operation Enduring Freedom* in 2001 the US was clear that it was responding to '[t]he attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization' and, in doing so, was taking action 'designed to prevent and deter further attacks on the United States.'⁶¹

However, while states possess a certain freedom to use force against such individuals located on the high seas, albeit with any restraints imposed by international human rights law and international humanitarian law, NSAs, and in particular terrorists, will normally be located on the territory of another state. In this respect, while this chapter has thus far sought to demonstrate that a use of force in self-defence in response to the actions of a NSA is possible in conceptual terms, it is the location of them in the territory of another state, and in this sense whether such action can be justified as necessary and proportionate,⁶² which has arguably created the most problematic issues. Indeed, if the NSAs are now located in another state, or a manifestation of that state such as an embassy,⁶³ then that state's sovereignty and territorial integrity provide an initial barrier to the victim state simply being able to launch forcible actions within its territory. In this way, it becomes necessary to examine whether, and if so how, the sovereignty barrier might be overcome.

3.2.1. Overcoming the sovereignty barrier: attribution to the host state

While, as noted above, the ICJ has taken a rather conservative approach in general to the issue of self-defence against the actions of NSAs, it did not say that an armed attack must be physically carried out by a state. On the contrary the ICJ in the *Nicaragua* case of 1986, and in drawing upon paragraph 3(g) of the 1974 Definition of Aggression, took the position that aggression, which it appeared to equate with an armed attack, may take the form of the 'sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [aggression], or its substantial involvement therein.'⁶⁴ Under this definition the actions of the

⁶⁰ See N. Shah, 'Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism', (2007) 12 *Journal of Conflict and Security Law* 95.

⁶¹ See UN Doc S/2001/946.

⁶² While the requirement of an armed attack is to be found in Article 51, these two criteria, which have been hailed by some as being of more relevance and significance than the armed attack criterion, are of a customary international law nature. See J.A. Green, *The International Court of Justice and Self-Defence in International Law* (Oxford: Hart, 2009), at 108-109. See, in general, J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004). For more on their operation in the use of force against NSAs see *infra* section 3.2.2.

⁶³ Although Ratner has claimed that whether such a manifestation of a state is covered by the term armed attack in Article 51 is 'contentious'. See Ratner, *supra* n. 46, at 339.

⁶⁴ Although this is a definition of 'aggression' as opposed to 'armed attack' there is nothing to suggest that there is a substantial degree of difference between the two, at least for the purposes of attribution. As Ratner notes, the Definition of Aggression 'does not define armed attack per se, but seems helpful in understanding its contours'. Ratner, *ibid.*, at 335.

NSAs should be ‘of such gravity as to amount’ to an act of armed force by traditional forces of a state. As noted above, NSAs have been recognized as capable of carrying out force of the necessary gravity for a response in self-defence.⁶⁵ However, under the ICJ’s apparent conception of self-defence, before an armed attack which has been perpetrated by NSAs becomes something against which a state can respond to in self-defence, it has to be shown that the NSAs concerned have been ‘sent by or on behalf’ of the state in which they are located, or that the state has been ‘substantially involved’ in the perpetration of the acts concerned. In other words, the actions of the NSA must be attributed to a state through the ‘effective control’ it exerted over them.⁶⁶

Although not specifically confirming or contradicting the ICJ’s apparent position in *Nicaragua* that for an armed attack by an NSA to give rise to the possibility of self-defence it must be attributed to a state through the ‘effective control’ standard,⁶⁷ the ICJ did endorse in general this standard of attribution in the 2007 *Bosnian Genocide* case and elaborated further upon what is required for this standard to be satisfied:

‘it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of “complete dependence” on the respondent State; it has to be proved that they acted in accordance with the State’s instructions or under its “effective control”. It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.’⁶⁸

The necessity for the attribution of the actions of NSAs to the host state through a relationship of ‘effective control’ accords with the traditional understanding of self-defence as a purely inter-state phenomena.⁶⁹ This is a view that has also been adopted by some writers, so that ‘if self-defence is invoked against action by armed groups it must be attributed to another State in the sense of proving the existence of substantial or effective control by that State of the armed group.’⁷⁰

Yet, accepting this high threshold of state involvement for the invocation of the right of self-defence raises various conceptual and practical issues. It is, for example, difficult to find any real examples of such ‘effective control’ in action.⁷¹ Today, while states are often involved in

⁶⁵ See *supra* section 3.2.

⁶⁶ *Nicaragua* case, *supra* n.8, at para.115. See *infra* section 3.2.2. for an alternative reading of the Court’s jurisprudence on this issue.

⁶⁷ The effective control standard of attribution was subsequently adopted in Article 8 of the International Law Commissions Articles on the Responsibility of States for Internationally Wrongful Acts (2001).

⁶⁸ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (2007) ICJ Reports 43, at para. 400. However, see the Dissenting Opinion Judge Al-Khasawneh (dissenting opinion, paras 36-39) and Judge ad hoc Mahiou (dissenting opinion, paras 113-117). See also *Independent International Fact-Finding Mission on the Conflict in Georgia*, Report, September 2009, vol II, 260: ‘In the law governing state responsibility, and arguably also for identifying the responsibility for an armed attack, control means “effective control”.’

⁶⁹ See, for example, H. Kelsen, ‘Collective Security and Collective Self-Defense under the Charter of the United Nations’ (1948) 42 *American Journal of International Law* 783, at 791.

⁷⁰ C. Antonopoulos, ‘Force by Armed Groups as Armed Attack and the Broadening of Self-Defence’, (2008) 55 *Netherlands International Law Review* 159, at 168; see also See Shah, *supra* n. 53, at 108-111.

⁷¹ Arguably an example of this standard of control in practice can be found in the attempted assassination of former US President George H.W. Bush in Kuwait in 1993 by Iraq. See D. Kritsiotis, ‘The Legality of the 1993

the terrorist activities of NSAs, it is almost never the case that they exert such a high degree of control over them. The burden of proof that victim states would need to meet before being able to establish the existence of a right of self-defence renders the very idea of self-defence redundant in most cases. It may also be that the NSA is not, or no longer, located within the territory of the controlling state, but instead within the territory of another state. In this case, while a forcible response may be taken against the controlling state, the NSA would be effectively protected from one. There thus exists the potential for terrorist organisations to operate with a degree of impunity from military response, even in relation to actions taken on a massive scale by said group against a state (in a world where traditional ‘one state against another’ style conflict is no longer the norm).⁷²

Furthermore, under the ‘effective control’ standard for attributing the acts of NSAs to states for the purposes of self-defence, the NSA concerned in effect becomes a limb of the controlling state, thus making the state fully responsible for its actions. In this case, the victim state may invoke its right of self-defence against both the non-state actors *and* the controlling state. Indeed, regardless of whether the victim state in fact wishes to take defensive measures against both, the only way the sovereignty barrier can be overcome, thus permitting self-defence against either, is by establishing such effective control. Yet, given that the armed attack may have been perpetrated by a NSA acting entirely without state support, or at least of the state upon whose territory it is located, is the victim state in these situations expected to simply sustain the attack without having the possibility of responding forcibly? Or might the victim state have the possibility of taking action only against those who actually physically perpetrated the armed attack, that is, the NSAs? Perhaps in such cases there might be more flexibility in terms of the sovereignty barrier, given that while force is to be used *within* a state it is not to be targeted specifically *against* it.

3.2.2. The sovereignty barrier and self-defence restricted to the targeting of NSAs located upon a host state’s territory

While some maintain that self-defence in the context of attacks by NSAs may only occur if the actions of the NSAs have been effectively controlled by a state,⁷³ others take the polar opposite view that there is now a right of self-defence against attacks by non-state actors regardless of any state involvement.⁷⁴ However, both of these positions throw up problems in that while the former means that NSAs can effectively act with impunity the latter fails to show any respect towards preserving the sovereignty of states. However, the jurisprudence of the ICJ on this issue, which as noted above has been influential in determining and shaping the law in this area, is not as rigid as at first might appear.

In both of the two main contentious cases of the ICJ in which the Court addressed claims to self-defence against attacks undertaken by NSAs – *Nicaragua* and *Armed Activities* – the state claiming self-defence targeted its defensive actions at least partly against the host state and its associated infrastructure. In the *Nicaragua* case, the US provided support to the

US Missile Strike on Iraq and the Right of Self-Defence in International Law’, (1996) 45 *International and Comparative Law Quarterly* 162, at 174.

⁷² Murphy, *supra* n.36, at 66.

⁷³ See, for example, A. Cassese, ‘The International Community’s Legal Response to Terrorism’, (1989) 38 *International and Comparative Law Quarterly* 589, at 596-7.

⁷⁴ See, for example, D. Janse, ‘International Terrorism and Self-Defence’, (2006) 36 *Israel Yearbook of Human Rights* 149, at 170-1.

contras in their operations against the Nicaraguan government and military. It was in this sense unsurprising that the court required attribution of the activities of the NSAs attacking El Salvador (which the US was acting in collective self-defence of) to Nicaragua before action could be taken against Nicaragua itself, as opposed to taking measures solely against the NSAs who physically perpetrated the attacks. Similarly, in the *Armed Activities* case, Uganda took action in self-defence against the DRC, as opposed to limiting its actions to the NSAs that were carrying out raids within its territory. Given that the conditions for self-defence against the DRC were not satisfied, in that the attacks carried out by rebel groups operating from the DRC's territory against Uganda were 'non-attributable to the DRC', the Court did not address the claims of self-defence by Uganda further and, importantly, expressly left the question open as to 'whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces'.⁷⁵ As Trapp notes, '[i]t seems far less incredible that the Court required that the armed attacks mounted by non-State actors be attributable to the State in whose territory defensive force was being used when one considers that the territorial State was itself the subject of defensive measures'.⁷⁶ In this respect, far from ruling that self-defence can only occur against a state or state controlled armed attack, the Court was, instead, silent as to the possibilities for self-defence if the action taken was restricted to the NSAs.

Furthermore, state practice does seem to point towards the emergence of a middle ground, in that it appears to bear witness to a shift towards the acceptance of forcible responses in self-defence that are limited to targeting the NSAs and their bases. Incidences of states restricting their forcible actions in self-defence to the NSAs located within another state's territory are not a recent phenomenon. For example, following the death of three Israeli citizens in Cyprus in 1985 Israel targeted the PLO headquarters in Tunis, Tunisia.⁷⁷ Israel, in invoking its right of self-defence, claimed that '[i]t was against [the PLO] that our action was directed, not against their host country'.⁷⁸ However, in order to justify its violation of Tunisian territory Israel nonetheless felt the need to state that 'the host country does bear considerable responsibility'.⁷⁹ In particular, 'Tunisia did not show an inkling of a desire or an intention to prevent the PLO from planning and initiating terrorist activities from its soil'.⁸⁰ In reaction, states, however, focused upon the fact that Tunisia could not be held responsible for the conduct of the PLO and therefore condemned the actions of Israel. As Trapp notes, [t]his line of argument is in line with some of the contemporaneous thinking on the right of self-defence',⁸¹ in that it was considered that the right of self-defence could only be invoked in response to an armed attack by a State, with a seeming rejection of the possibility for attribution being found in acquiescence in terrorist activities.

Yet, twenty years later attitudes apparently began to shift, arguably with the recognition of the emergence of what might be described as 'global' terrorism. In response to the bombing of its embassies in both Kenya and Tanzania in 1998, the US responded by bombing an al-Qaida training camp in Afghanistan and a pharmaceutical plant in Sudan, which it claimed was being used by the terrorist group to manufacture biological weapons.⁸² Importantly,

⁷⁵ *Armed Activities* case, *supra* n. 38, at para.147.

⁷⁶ Trapp, *supra* n.39, at 142.

⁷⁷ UN Doc A/40/688-S/17502 (1985).

⁷⁸ UN Doc. S/PV.2611 (1993) 22-5.

⁷⁹ *Ibid.*

⁸⁰ UN Doc S/PV.2611 (1993) 26.

⁸¹ Trapp, *supra* n.39, at 149.

⁸² UN Doc S/1998/780. See, in general, J. Lobel, 'The Use of Force to Respond to Terrorist Attacks: The

sharing Israel's justification in 1985, the US claimed only to be attacking installations of al-Qaida in invoking its right of self-defence and not the states in which they were located. Furthermore, they were 'carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organization'.⁸³ However, on this occasion any condemnation of the response was limited to the attack on the pharmaceutical plant, as there was no evidence to suggest that this had been used for anything other than civilian purposes, with little condemnation of the attack on the training camp or the justification of self-defence in general.

While every action in self-defence is different, this general pattern of states limiting their actions to the targeting of NSAs located in a host state while claiming at least some responsibility of the state for failing to put an end to the activities of the NSAs can be seen in subsequent state practice. Israel's use of force against Hezbollah in Lebanon in 2006,⁸⁴ Russia's use of force against Chechen rebels in Georgia in 2002,⁸⁵ Colombia's forcible response against FARC in Ecuador in 2008,⁸⁶ and Turkey's 2008 'Operation Sun' in northern Iraq⁸⁷ are all examples of this practice, which represents recognition that 'states can invoke self-defence against terrorist attacks not imputable to another state'.⁸⁸ However, perhaps the most prominent example of this practice can be found in the US' incursion into Pakistani territory in the raid to apprehend Osama bin Laden in 2011.⁸⁹ This general practice does not suggest, however, that it is no longer necessary to establish 'effective control' by a host state over the actions of a NSA for self-defence to extend to taking action directly against the state concerned.

However, an anomaly to this line of state practice is the response taken by the US to the 9/11 attacks in that while the attacks were undertaken by the al-Qaida group the US actions in self-defence in Afghanistan were directed against both al-Qaida *and* the *de facto* government of Afghanistan, the Taliban. Indeed, while only claiming that the attacks had 'been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation' the US nonetheless included 'measures against Al-Qaeda terrorist training camps *and* military installations of the Taliban regime in Afghanistan'.⁹⁰ *Operation Enduring Freedom* was notable for two reasons. First, the 'harbouring' standard of attribution employed by the US on this occasion stood in stark contrast to the 'effective control' standard expressly adopted by the ICJ and seemingly witnessed in state practice.⁹¹ While accepted on this occasion, the harbouring standard has not been witnessed since, arguably due to an underlying recognition of dangerous

Bombing of Sudan and Afghanistan', (1999) 24 *Yale Journal of International Law* 537.

⁸³ Ibid.

⁸⁴ UN Doc. S/2006/560.

⁸⁵ UN Doc. S/2002/854; UN Doc. S/2002/1012.

⁸⁶ See Comunicado del Ministerio de Relaciones Exteriores de Colombia, 081, Bogota, 2 March 2008, <http://web.presidencia.gov.co/comunicados/2008/marzo/81.html> for the specifics of this self-defence claim.

⁸⁷ UN Doc. A/HRC/7/G/15.

⁸⁸ Tams, *supra* n.30, at 381.

⁸⁹ See M.S. Wong, 'Targeted Killings and the International Legal Framework: With Particular Reference to the US Operation Against Osama bin Laden', (2012) 11 *Chinese Journal of International Law* 127.

⁹⁰ UN Doc S/2001/946 (emphasis added).

⁹¹ See C. Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Farnham: Ashgate, 2010), at 137-170.

consequences that it has the potential for if used in the longer term.⁹² Secondly, it was also a notable incident in that the targeting of the NSAs responsible for the armed attack along with the host state was out of step with the more limited strikes that have now become a part of state practice following the US's actions in Afghanistan and Sudan in 1998.

The question remains, however, as to how we legally rationalise this new practice. It has been suggested by some that it represents a lowering of the threshold for attribution. For example, as opposed to the need to demonstrate 'effective control' over the NSAs, states now only need to act with 'complicity'⁹³ or 'acquiescence'⁹⁴ in the conduct of the NSAs, or to 'aid and abet' them.⁹⁵ Yet, it is somewhat artificial to 'attribute' the actions of NSAs to a state when it may have not taken any positive action itself in connection with their commission, and does give rise to the impression that action may be taken against the host state as well as the NSAs which lies in contrast to the recent state practice.⁹⁶ Furthermore, while this seems to cover the occasions when a host state is unwilling to take action against the NSAs, it would seem somewhat unrealistic, not to mention unfair, to attribute the actions of a NSA to such a state merely on the basis that it was unable to take, or was unsuccessful in taking, action against the NSAs upon its territory.⁹⁷

As a response, and while maintaining the necessity for attribution under the effective control standard, if the defending state wishes to extend its defensive actions *against*, as opposed to merely *within*, the host state and its infrastructure, another view is that attribution is not necessary if the victim wishes to limit its response solely against the non-state actors. However, '[u]sing force against the base of operations of non-State terrorist actors within another State's territory surely amounts to a violation of that State's territorial integrity, even if the use of force is defensive and not targeted at the State's apparatus.'⁹⁸ In this sense, it has

⁹² Ibid. Although for a recent argument in favour of it see D. Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors', (2012) 106 *American Journal of International Law* 774, principle 11.

⁹³ Tams, *supra* n.30, at 385.

⁹⁴ D. Jinks, 'State Responsibility of the Acts of Private Groups', (2003) 4 *Chicago Journal of International Law* 83.

⁹⁵ T. Ruys and S. Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence', (2005) 10 *Journal of Conflict and Security and Law* 289, at 315.

⁹⁶ Tams notes that 'the underlying legal claim argument – that states aiding and abetting terrorists abuse their sovereignty and *must accept some form of counter-action* – has become a standard formula of modern debates and would probably meet with approval of some and tacit agreement of many states.' Tams, *supra* n.29, at 393 (emphasis added). This again gives the impression that the action in self-defence is taken *against* the state itself as opposed to *on* the state's territory.

⁹⁷ Tams concedes that the attribution approach has limitations in that 'where a state is unaware of terrorist conduct it will not be exposed to forcible responses', but does not then go on to say whether a victim state must simply sit and do nothing or whether and what sort of action it is able to take should the host state be unable to offer the protection it requires. Ibid., at 386. Trapp, on the other hand, notes that in this circumstance 'the victim State is left with little choice. Either it respects the host State's territorial integrity at great risk to its own security, or it violates that State's territorial integrity in a limited and targeted fashion, using force against (and only against) the very source of the terrorist attack.' Trapp, *supra* n.39, at 147.

⁹⁸ Trapp, *ibid.*, at 145. See also D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmshurst (ed.), *International Law and the Classification of Armed Conflicts* (Oxford: Oxford University Press, 2012), 32, at 73-74, where it is stated that 'the use of force by [a defending state against NSAs] on the territory of the territorial State, without the consent of the latter, is a use of force *against* the territorial State. This is so even if the use of force is not directed against the government structures of the territorial State, or the purpose of the use of force is not to coerce the territorial State in any way.' While this view is in some ways appealing, and such uses of force may well give rise to an international armed conflict (legally speaking) it fails to fully engage with the distinctions highlighted in this section regarding actions in self-defence, in particular that of the victim state limiting its actions as far as possible by only taking those necessary to defend itself given

been suggested that both the jurisprudence of the ICJ and the state practice can be explained upon the basis of the customary law criteria of necessity and proportionality,⁹⁹ so that if a host state is unable or simply unwilling to effectively deal with the terrorist group on its territory it then becomes necessary for the victim state to do so itself. However, this does mean that before an action in self-defence can be justified as necessary, the possibility of seeking a solution via the territorial state should normally be explored first. This would mean that it should either request the host state to take the appropriate means (not necessarily of a forcible nature) to cease the activities of the NSA, or request consent to do so itself. If it transpires that the host state is either unable or unwilling to assist then a right of self-defence will arise, possibly after, and depending upon the circumstances, the victim state having approached the UNSC to take or authorize appropriate action.¹⁰⁰ For example, while the Somali authorities were simply unable to cease the activities of al-Shabaab in the border region with Kenya before Kenya invaded Somali territory in 2011 invoking its right of self-defence under Article 51,¹⁰¹ the international community appeared to accept that the Taliban regime was unwilling to take action against al-Qaida or permit the US to do so in 2001. Furthermore, the fact that the victim state limits its forcible actions to targeting the NSAs concerned means that its actions, in principle, can be justified as proportional. The action taken, while in quantitative terms may be perceived as disproportionate, as it may well result in greater destruction and loss of life than the attacks it is responding to, the prospective aim of ceasing, or attempting to cease, the activities of the NSA will favorably affect the proportionality equation. As Tams has observed, '[w]here there is a well-founded fear of repetition ... the international community seems to have accepted that states are entitled to use self-defence as a means of severely weakening the terrorist organisation'.¹⁰² These twin principles of customary international law thus provide a means to overcome the sovereignty barrier while maintaining the inter-state context of the law governing self-defence against armed attacks by NSAs.

4. Conclusion

This chapter has attempted to show that while states have not recognized NSAs as subjects of either the norm prohibiting the use of force or the right of self-defence, these actors have come to play a greater role in the regime governing the use of force. The ICJ has been instrumental in developing and highlighting the rules governing the use of force in the context of non-state actors. Yet, while '[t]he traditional approach requiring "effective state control" may have become accepted over time, [...] it was a standard developed by the Court, not God-given',¹⁰³ and 'the Court has yet to engage recent State practice of using defensive force against non-State actors in reliance on Article 51 of the UN Charter'.¹⁰⁴ With the advent, or at least recognition, of global terror networks, it is now safe to say that it has been recognized through state practice that not only can NSAs be the perpetrators of 'armed

that the territorial state has proved to be either unable or unwilling to take action against the NSAs concerned. For example, when Israel undertook its mission *in* Lebanon in 2006 in response to the Hezbollah attacks, this was not justified by Israel or perceived by the international community as an action *against* Lebanon. Indeed, it was only when Israel began targeting Lebanese infrastructure that claims of illegality became audible.

⁹⁹ See, for example, Trapp, *ibid.*, at 145-155.

¹⁰⁰ See *supra* section 3.1.

¹⁰¹ See V. Hadzi-Vidanovic, 'Kenya Invades Somalia Invoking the Right of Self-Defence', *EJIL Talk!*, 18 October 2011, available at <http://www.ejiltalk.org/kenya-invades-somalia-invoking-the-right-of-self-defence/>.

¹⁰² Tams, *supra* n.31, at 413.

¹⁰³ Tams, *supra* n.30, at 386.

¹⁰⁴ Trapp, *supra* n.39, at 150.

attacks' for the purposes of triggering the right of self-defence but that the relationship that exists between them and their host state does not have the rigid consequence for a victim state that it once did. This should not necessarily be seen as a weakening of the rules – including that of attribution – or the promotion of the use of force globally, but more a recognition of what the twin regulatory norms of necessity and proportionality mean in today's world. Of course, the 'global war on terror' has meant more force being used and, with the use of drones becoming increasingly prevalent, different and often controversial means in its deployment. Yet, with focus upon these fundamental twin principles of the regime of self-defence, and the further development and refining of sub-tests such the 'unable or unwilling' standard,¹⁰⁵ not only is the use of force regime still seen through the prism of state sovereignty, but NSAs are less able to act with impunity.

¹⁰⁵ In this regard see Deeks, *supra* n.52.